



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR LEAVE TO AMEND DENIED:
November 8, 2016

CBCA 4965

CRANE & CO., INC.,

Appellant,

v.

DEPARTMENT OF THE TREASURY,

Respondent.

Stephen D. Knight and Laura A. Semple of Smith Pachter McWhorter PLC, Tysons Corner, VA, counsel for Appellant.

Sidney Rocke, Katherine Allen, and Rachel McGuane, Office of the Chief Counsel, Bureau of Engraving and Printing, Department of the Treasury, Washington, DC, counsel for Respondent.

Before Board Judges **SOMERS**, **WALTERS**, and **LESTER**.

LESTER, Board Judge.

Pending before the Board is an August 15, 2016, motion from appellant, Crane & Co., Inc. (Crane), seeking leave to file an amended complaint. Respondent, the Department of the Treasury (Treasury), objects to that motion, arguing that it would be prejudiced by the amendment, that Crane failed to comply with the Board's rules in seeking leave, and that the

amendment would be futile. For the reasons explained below, we deny Crane's motion for leave to amend as futile.

Factual Background

I. Crane's Original Claim

On March 14, 2007, the Bureau of Engraving and Printing (BEP or agency) awarded a contract to Crane for insertion of Optically Variable Thread (OVT) into the Type V NexGen Distinctive Currency Paper. On March 6, 2014, Crane submitted a certified claim to the BEP contracting officer, seeking an equitable adjustment of \$17,054,569 pursuant to the Changes clause of the contract, 48 CFR 52.243-1 (2006). Appeal File, Exhibit 37 at 1.¹

In its claim, Crane represented that the contract specifications, as originally written, required that, without exception or qualification, the OVT had to bind to the currency paper into which it was being inserted and remain bonded after the "laundry test" that Crane was required to perform, as follows:

3.2.2.2.5 Windowed Thread in Paper Bonding. The exposed portions of the thread shall adhere to the surface of the paper and the embedded portions of the thread shall bind to the paper fibers such that the thread breaks or cannot be pulled out from the sheet before the thread has stretched to at least 1.3 times its original length when evaluated in accordance with the test method specified in section 4.2.3.15.

3.2.2.2.7 Windowed Thread in Paper Resistance to Laundering. The currency paper manufacturing process shall not cause the windowed security thread in the paper to not meet the resistance to laundering requirements when tested in accordance with Section 4.2.3.18. The laundering resistance requirements are as follows: After the windowed thread in paper is laundered, the color of the thread shall not change and the thread, the image on the thread, and the optically variable effect of the image on the thread shall not be significantly degraded. In addition, the exposed portions of the thread shall remain bonded to the surface of the paper after the windowed thread in paper is laundered.

¹ All exhibits referenced in this decision are found in the appeal file, unless otherwise noted.

4.2.3.18 Resistance to Laundering. The laundering test will be performed by the BEP on notes printed on the paper in accordance with STM 300.002.

Id. at 1-2. This “laundry test” method, Crane asserted in its claim, “applied to all types of currency papers approved for BEP use, in-process printed sheets, and finished currency notes.” *Id.* at 2. Crane further indicated that “[t]his test method required that the paper or printed note samples be randomly layered in the washing machine, with cotton towels, according to a described guideline.” *Id.*

Crane represented in its claim that the “specification proved to be defective and ultimately impossible to perform.” Exhibit 37 at 2. It alleged that, in early 2007, it “saw that OVT was failing to meet the [required] specifications” because “OVT was not remaining 100% bonded to the surface of the paper.” *Id.* It further alleged that, “in spite of having previously received approximately nine (9) sample sets of NexGen100 paper manufactured under trial conditions,” the agency “had not reported such failures to Crane.” *Id.* After Crane brought the failures that it found to BEP’s attention, the parties “agreed to work collaboratively to study laundry and chemical soak correlations of blank paper . . . to develop a method of testing the currency paper prior to banknote printing that would correlate to BEP’s testing in printed banknotes.” *Id.* This work, Crane alleged, “lasted from March 2007 to approximately March 2008.” *Id.* Throughout that period, according to Crane, “BEP maintained that the laundry specification, requiring 100% pass rate for windowed threads remaining bonded to the surface of the paper, and that the laundry test procedure to achieve this result[,] was not modified.” *Id.*

Crane then alleged that, at a meeting in March 2008, “BEP agreed that the specification should be changed because of impossibility of meeting the original specification” and that, by written contract modification dated April 30, 2008, BEP formally changed the bonding requirements in specification 3.2.2.2.11. Exhibit 37 at 3. Crane alleged that BEP incorporated the revised specification, including changed testing methods, into several of Crane’s OVT and distinctive currency paper contracts, which added a second tier of laundry testing designed to evaluate windowed thread adhesion in currency paper. *Id.*

II. Crane’s Supplement to its Claim

On October 15, 2014, in response to a request for documentation in support of its claim, Crane submitted a claim supplement in which, along with supporting documentation, Crane offered an additional narrative in support of its monetary request. In that narrative, Crane broke the time periods important to its claim into four phases: (1) December 2006 through July 2007; (2) August 2007 to September 2007; (3) September 2007 through February 2008; and (4) March 2008. Exhibit 39 at 1. In that narrative, Crane noted that it

had first identified problems with laundry testing results in December 2006, when it was preparing bid samples, where “the OVT did not remain 100% bonded to the surface of the paper, as required” by the specification. *Id.* at 3. It had told BEP of these failures in January 2007, “with banknote specimens presented showing OVT ‘lifting’ and pull-outs from the currency paper.” *Id.* Crane reiterated the problem that it was having with OVT “lifting” during testing in February 2007, but BEP had indicated that, in its own testing of Crane’s samples, it was finding neither “lifting” nor “peeling” on any of the testing specimens. *Id.* at 3, 6. Despite Crane’s disclosure of pre-award testing problems, BEP awarded Crane the OVT insertion contract on March 14, 2007, using the same specifications that had been in the request for proposals. *Id.* at 4. Crane reiterated that, throughout this period, BEP “required strict adherence to the laundering terms of the OVT contract – a 100% pass rate for windowed threads remaining bonded to the surface of the paper.” *Id.* at 5.

In August 2007, Crane alleged, BEP sent an email message to Crane with a spreadsheet of July 2007 testing results showing “many failures.” Exhibit 39 at 5. BEP reiterated that Crane would “have to work towards achieving the 100% pass rate for finished bank notes.” *Id.* At a meeting on September 10, 2007, however, BEP indicated that, although Crane was not allowed to modify the laundry test procedure, it would allow Crane to “perform some kind of enhanced aging or other treatment if Crane could demonstrate that such techniques improved laundry results,” and it provided Crane with an accelerated time frame for resolving the laundry test failures. *Id.* at 6. Nevertheless, at that same meeting, BEP allegedly changed its position on the February 2007 test results and now said that, even though it originally had said that there was neither “lifting” nor “peeling” in any of the testing specimens, the February 2007 numbers were no longer considered “good enough” because they did not achieve a 100-percent pass rate. *Id.* According to Crane, BEP then demanded a 100-percent pass rate for blank paper. *Id.*

By the end of October 2007, however, the demand for strict adherence to the contract specifications had changed, according to Crane, with BEP becoming “open-minded about moving the spec to be less than 100% bonded underneath the whole window surface.” Exhibit 39 at 6. Crane alleged that, by November 2007, BEP recognized the need for a full-scale modification of the laundry test contract requirements, a change upon which the parties agreed at a meeting in March 2008 and that resulted in a formal written contract modification on April 30, 2008. *Id.* at 7.

In the supplement, Crane also increased its claimed amount from \$17,054,569 to \$19,014,550. Exhibit 39 at 2.

Crane subsequently submitted another supplement to its claim on December 19, 2014, providing additional documents to BEP, but without adding any additional narrative to the claim. Exhibit 41 at 1. Crane also decreased its claim to \$18,062,172. *Id.*

III. The Contracting Officer's Decision

On June 30, 2015, the BEP contracting officer denied Crane's claim. Exhibit 44. He challenged many of Crane's factual assertions and indicated that, contrary to the suggestions in Crane's claim, BEP did not provide written authorization to proceed after first article testing until September 2009 and did not place any orders against Crane's distinctive currency paper and OVT contracts until December 2009 and January 2010, respectively. As a result, he said, "any costs incurred on either contract prior to the written authorization from the Contracting Officer to proceed with the production of materials were at the expense of the Contractor." *Id.* at 3. Further, with regard to Crane's impossibility claim, the contracting officer indicated that, since Crane acknowledged knowing of the alleged impossibility of meeting the testing requirements in December 2006 – before the contract was awarded in March 2007 – Crane assumed the risk of impossibility. *Id.* at 4 (citing *Whittaker Corp.*, ASBCA 14191, et al., 79-1 BCA ¶ 13,805). He also stated that Crane "possessed superior knowledge in determining a compatible adhesive for the [OVT] performance during the paper manufacturing process," knowledge upon which BEP was entitled to rely as Crane performed. *Id.* at 4-5 (citing *Bethlehem Corp. v. United States*, 462 F.2d 1400 (Ct. Cl. 1972)).

IV. Crane's Original Complaint to the Board

Crane timely appealed the BEP contracting officer's decision to the Board. On October 26, 2015, soon after filing its notice of appeal, Crane filed a complaint in which it alleged that the bonding specifications in the March 2007 contract (and other similar contracts that Crane later acquired) "proved defective and ultimately impossible to perform." Complaint ¶ 10. Crane alleged that BEP "continued to maintain strict adherence to the original specifications until observing its own laundry testing failures several months later" and that, at a meeting in March 2008, "BEP acknowledged the impossibility of meeting the original specifications and agreed to amend the OVT Contract." *Id.* ¶ 15. Crane sought to recover the costs that it incurred "in research, development, testing and paper trials attempting to achieve the original defective specifications" before they were modified at the March 2008 meeting, *id.* ¶ 20, as well as the "costs [incurred] in its search [during that time] to find an adhesive that would bond the OVT Thread to the surface of the Type V NexGen Distinctive Currency Paper" before the specifications were modified. *Id.* ¶ 21.

After the Government filed its answer on November 24, 2015, the parties requested a suspension of proceedings to allow them to pursue the possibility of an amicable resolution of their dispute with a third-party mediator, a request that the Board granted.

V. The Motion for Leave to Amend

On August 15, 2016, after the parties' mediation effort ended without a settlement, Crane filed a motion for leave pursuant to Rule 6(e) of the Board's Rules, *see* 48 CFR 6101.6(e) (2015), seeking permission to amend its complaint.

Through its proposed amended complaint, which accompanied the motion for leave, Crane would add two new legal theories to its appeal: (1) that BEP constructively changed the contract in September 2007 by imposing a new strict interpretation of the laundry testing requirements that differed from Crane's original understanding of the requirements, and (2) that the original contract specifications were ambiguous with regard to laundry testing, resulting in a September 2007 direction that clarified an ambiguity for which BEP should be responsible. To support its new legal theories, Crane has somewhat changed the factual allegations that it had made in its claim and its original complaint. Crane now alleges that, when it was conducting its own pre-bid testing in January 2007, it had viewed an OVT that exhibited "lifting" as unacceptable under the original testing protocol, but that "[a]ny other results, including a 'peel' of the Thread from the banknote (meaning the Thread edge was detached but not completely through the width of the Thread), constituted a pass." Proposed Amended Complaint ¶ 15. It also alleges that, in September 2007, "BEP drastically changed its interpretation of the Contract laundry specifications, requiring Crane to achieve a Thread bonding result well beyond the standard that had been established in January 2007 and what Crane reasonably expected when entering into the Contracts with the BEP." *Id.* ¶ 18. At that September 2007 meeting, BEP allegedly "informed Crane that it [now] considered not just full 'lifting' to be a failure but any 'peeling' whatsoever" and that Crane would now have to achieve 100-percent bonding "not just on finished banknotes that had been varnished and printed as in the original specification, but on unprinted paper as well." *Id.* Crane alleges that it immediately conducted a search to find an improved adhesive that would keep the OVT sufficiently bonded to the currency paper during laundry testing, "including now on unprinted paper, to meet the BEP's new stringent standards," *id.* ¶ 19, and it performed other work to meet an October 2007 directive. *Id.* ¶ 20.

Under both of Crane's new theories, Crane was damaged by BEP's direction in September 2007 changing the interpretation of the laundry testing requirements under which Crane had allegedly been operating.

In opposing Crane's motion for leave, BEP argues that Crane failed to follow the Board's required procedures for filing a motion for leave to amend and that BEP would be prejudiced by any amendment. It also argues that adding the new legal theories to the appeal would be futile for two reasons: first, the Board would lack jurisdiction to entertain new legal theories because they are based upon a different set of operative facts than those set forth in Crane's certified claim, and, second, even if covered by the certified claim, the constructive change and ambiguity claims were already time-barred when that certified claim was submitted in March 2014.

Discussion

I. Standards Applicable to Motions for Leave to Amend Complaints

In appeals arising under the CDA, the appellant, in accordance with Board Rule 6(b), is typically expected to file with the Board within thirty days after the docketing of the appeal a complaint setting forth the appellant's claim or claims in simple, concise, and direct terms. 48 CFR 6101.6(b). Pursuant to Board Rule 6(e), the appellant is entitled to amend that complaint once without leave of the Board "at any time before a responsive pleading is filed." *Id.* 6101.6(e). Once the Government has filed its answer to the complaint, however, an amended complaint may be filed only by leave of the Board. *Id.* Here, Crane filed its initial complaint on October 26, 2015, and the Government filed its answer on November 24, 2015. Accordingly, as Crane recognizes, Crane can file the amended complaint that it submitted to the Board on August 15, 2016, only by seeking the Board's permission.

Our rules do not expressly address the standards that we should apply in evaluating motions for leave to amend a complaint. "In the absence of applicable Board Rules" creating such standards, "the Board generally employs the Federal Rules of Civil Procedure," and particularly Federal Rule of Civil Procedure (FRCP) 15, "as guidelines." *Rain & Hail Insurance Service, Inc.*, AGBCA 97-170-F, et al., 97-2 BCA ¶ 29,278, at 145,676; *see American Forest Products Co.*, AGBCA 79-170-1, 83-1 BCA ¶ 16,316, at 81,096 (applying decisions interpreting FRCP 15 to guide evaluation of motion for leave to amend complaint). Although we are "not inexorably bound to apply those rules to administrative hearings which are generally of a somewhat less formal nature" than federal court proceedings, *N&P Construction Co.*, VABCA 2578, et al., 92-1 BCA ¶ 24,447, at 121,981 (1991), we still look to the principles underlying FRCP 15 when a request for leave to amend a complaint has been opposed to ensure fairness to the parties. *See Fletcher & Sons, Inc.*, VABCA 3248, 92-1 BCA ¶ 24,726, at 123,407.

FRCP 15 "reflects two of the most important policies of the federal rules" – first, "to provide maximum opportunity for each claim to be decided on its merits rather than on

procedural technicalities,” and, second, to limit the role of the complaint and answer to that of providing “notice of the nature of the pleader’s claim or defense and the transaction, event, or occurrence that has been called into question” (rather than of providing the “fact revelation and issue formulation” that is now obtained through the discovery process). 6 Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice & Procedure* § 1471, at 587-59 (3d ed. 2010). In accord with those policies, the Supreme Court has held that, absent a specific justifying reason such as prejudice to the opposing party or futility of amendment, leave to amend a complaint or an answer is to be freely given:

Rule 15(a) declares that leave to amend “shall be freely given when justice so requires”; this mandate is to be heeded. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be “freely given.” Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.

Foman v. Davis, 371 U.S. 178, 182 (1962) (citation omitted); *see Espey v. Wainwright*, 734 F.2d 748, 750 (11th Cir. 1984) (FRCP 15’s policy of “liberally permitting amendments to facilitate determination of claims on the merits circumscribes the exercise of the trial court’s discretion”).

Nevertheless, “[t]he requirement of judicial approval suggests that there are instances where leave should not be granted.” *Mertens v. Hummell*, 587 F.2d 862, 865 (7th Cir. 1978) (quoting *Klee v. Pittsburgh & West Virginia Railway Co.*, 22 F.R.D. 252, 255 (W.D. Pa. 1958)). “[I]n deciding whether to permit such an amendment, the trial [tribunal is] required to take into account” prejudice to the non-moving party, *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330-31 (1971) (emphasis added), and should also consider other factors, including the futility of the amendment. *Foman*, 371 U.S. at 182; *see Cencast Services, L.P. v. United States*, 729 F.3d 1352, 1363 (Fed. Cir. 2013) (“such amendments are not allowed where they result in undue delay or prejudice”).

II. BEP's Procedural Objection

BEP complains that Crane's motion for leave is defective because, when filing the motion, Crane did not comply with Rule 8(a) of the Board's rules. Rule 8(a) provides that, "[e]xcept for joint motions by the parties, all motions must represent that the moving party has attempted to discuss the grounds for the motion with the non-moving party and tried to resolve the matter informally." 48 CFR 6101.8(a). Crane filed its motion for leave to amend without any such representation and without indicating whether BEP would oppose the motion for leave.

We cannot accept Crane's assertion (in its reply to BEP's opposition brief) that, in filing its motion for leave, it fully followed the Board's rules of procedure. Rule 8(a) clearly and unequivocally requires a party to attempt to confer with the opposing side before filing a motion and to represent to the Board that such efforts have been made. One purpose of that rule is to allow the Board to take immediate action on a motion that is not going to be opposed, without having to wait twenty days to see if the opposing side files a response pursuant to Board Rule 8(f). A failure to make the representations required by Board Rule 8(a) constitutes a failure to comply with our rules, which we cannot condone. *Mission Support Alliance, LLC v. Department of Energy*, CBCA 4985, 16-1 BCA ¶ 36,210, at 176,685 n.1.

Nevertheless, because Crane could simply refile its current motion (after consulting with BEP) were we to dismiss Crane's current motion for failure to comply with Rule 8(a), and because the parties have already undertaken the work necessary fully to address BEP's substantive objections to the motion for leave, we will not waste the parties' time and resources by rejecting the current motion on this procedural ground.

III. Prejudice

The Government asserts that it would be prejudiced by Crane's proposed amendment. It asserts that, after receiving Crane's claim, the contracting officer devoted significant energy to investigating the impossibility theory that Crane espoused, "tailor[ing] his requests for further information by seeking out information that would provide details and facts related to this particular issue." BEP's Response at 11; *see id.* at 15-16. Apparently, BEP believes that, if Crane is allowed to amend its complaint, this effort will have been wasted.

"[P]rejudice can result where a proposed amendment raises a new legal theory that would require the gathering and analysis of facts not already considered by the opposing party, but that basis for a finding of prejudice essentially applies where the amendment is offered shortly before or during trial." *Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 510

(4th Cir. 1986); *see Cencast Services*, 729 F.3d at 1364 (“It is clear that, ‘if the amendment [to a pleading] substantially changes the theory on which the case has been proceeding and is proposed late enough so that the opponent would be required to engage in significant new preparation, the court may deem it prejudicial.’” (quoting 6 Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *supra*, § 1487, at 716)). “An amendment is not prejudicial, by contrast, if it merely adds an additional theory of recovery to the facts already pled and is offered before any discovery has occurred.” *Laber v. Harvey*, 438 F.3d 404, 427 (4th Cir. 2006); *see Meyer Group, Ltd. v. United States*, 115 Fed. Cl. 645, 650 (2014) (“Undue prejudice exists when amendment would prevent the non-movant from adequately responding to the new claims.”).

Here, the parties have not yet engaged in discovery, and there is no allegation that there are witnesses essential to the new legal theories who would have been, but because of Crane’s delay are no longer, available to the parties. BEP has shown no basis for denying Crane’s motion as a result of prejudice. *See Atlantic Bulk Carrier Corp. v. Milan Express Co.*, No. 10-CV-103, 2010 WL 2929612, at *4 (E.D. Va. July 23, 2010) (“The party opposing amendment bears the burden of showing prejudice.”).²

IV. Futility

A. Standards for Evaluating Futility

The Government asserts that the amendment would be futile for two reasons: (1) because the allegations contained in the new complaint address matters that are not covered by the claim underlying this appeal, meaning that we lack jurisdiction to entertain those allegations, and (2) because, even if they were encompassed by the claim, the new legal theories in the amended complaint are barred by the applicable statute of limitations.

“When a party faces the possibility of being denied leave to amend on the ground of futility, that party must demonstrate that its pleading states a claim on which relief could be granted, and it must proffer sufficient facts supporting the amended pleading that the claim could survive a dispositive pretrial motion.” *Kemin Foods, L.C. v. Pigmentos Vegetales del Centro S.A. de C.V.*, 464 F.3d 1339, 1354-55 (Fed. Cir. 2006). “Where a complaint, as amended, would be subject to dismissal, leave to amend need not be granted.” *DeLoach v. Woodley*, 405 F.2d 496, 497 (5th Cir. 1968); *see Taylor v. United States*, No. 13-112C, 2013

² BEP also suggests that it will be prejudiced if Crane is allowed to add its new theories because it will have to litigate theories over which the Board has no jurisdiction. BEP Response at 15-16. This is really a futility argument, which we address below.

WL 1094818, at *1 (Fed. Cl. Mar. 18, 2013) (“A motion to amend may be found futile if the proposed amended complaint fails to state a claim upon which relief may be granted.”).

Crane argues that we need not consider futility as a ground for denying its motion for leave because the only cases that BEP cites in support of its position are from a circuit other than the Federal Circuit, such that we are not bound to follow them. Appellant Reply at 25. Yet, futility is a well-established ground for denying leave to amend, as both the Federal Circuit and the Supreme Court have made clear. *See, e.g., Foman*, 371 U.S. at 182; *International Custom Products, Inc. v. United States*, 791 F.3d 1329, 1339-40 (Fed. Cir. 2015); *Giorgio Foods, Inc. v. United States*, 785 F.3d 595, 600-04 (Fed. Cir. 2015); *Trevino v. United States*, 557 F. App’x 995, 998 (Fed. Cir. 2014); *Kemin Foods*, 464 F.3d at 1354-55. The fact that BEP may not have cited to Federal Circuit or Supreme Court precedent does not make that precedent disappear, and it does not eliminate Crane’s burden of demonstrating that its new theories could withstand a motion to dismiss for failure to state a claim.

To the extent that Crane is suggesting that we should simply accept Crane’s new complaint and defer until a later date, when there is a more fully developed record, our consideration of whether Crane’s new legal theories could withstand a motion to dismiss, we decline Crane’s invitation. If the new legal theories are going to be subject to dismissal, based upon the allegations as Crane has framed them, we see no reason to prolong litigation on them and to require BEP to devote additional expense and resources addressing them. Failing to address the potential futility of Crane’s new legal theories now would violate our obligation under Board Rule 1 to attempt “to secure the just, informal, expeditious, and inexpensive resolution of every case.” 48 CFR 6101.1(c).

B. Whether the New Theories Are A Part of Crane’s March 2014 Claim

BEP argues that Crane’s new constructive change and ambiguity theories of recovery are not encompassed with the certified claim underlying this appeal, which was based upon an impossibility theory. As a result, BEP argues, the new claims would be subject to dismissal for lack of jurisdiction if the complaint were amended to add them to this appeal. Accordingly, amendment of the complaint to add these new theories, BEP asserts, would be futile.

Each “claim” brought under the CDA must be submitted in writing to the contracting officer, with adequate notice of the basis for the claim. *Santa Fe Engineers, Inc. v. United States*, 818 F.2d 856, 858 (Fed. Cir. 1987). Although a contractor, when proceeding before this Board, may increase the amount of its claim, it “may not raise any *new* claims not presented and certified to the contracting officer.” *Id.* (emphasis in original); *see Reliance Insurance Co. v. United States*, 931 F.2d 863, 866 (Fed. Cir. 1991). In determining whether

a contractor's attempt to alter the legal theories underlying its claim constitutes a "new" claim, tribunals "look at whether the new issue is based on the same set of operative facts" as the claim submitted to the contracting officer. *Foley Co. v. United States*, 26 Cl. Ct. 936, 940 (1992), *aff'd*, 11 F.3d 1032 (Fed. Cir. 1993); see *Placeway Construction Corp. v. United States*, 920 F.2d 903, 908 (Fed. Cir. 1990) (to determine if same "claim," court must consider whether all are based upon common set of operative facts); *Battley v. Social Security Administration*, CBCA 1063, 08-2 BCA ¶ 33,896, at 167,768 ("The established test for what constitutes a 'new' claim is whether 'claims are based on a common or related set of operative facts.'" (quoting *Environmental Safety Consultants, Inc.*, ASBCA 06-1 BCA ¶ 33,230, at 164,666)).

"Operative facts are the essential facts that give rise to a cause of action." *Kiewit Construction Co. v. United States*, 56 Fed. Cl. 414, 420 (2003). In determining whether various theories involve the "same set of operative facts," courts and boards have generally identified whether the facts necessary to establish the elements of the legal theories underlying each "claim" are essentially the same or interrelated. See *Trusted Integration, Inc. v. United States*, 659 F.3d 1159, 1168 (Fed. Cir. 2011) (claims were not based on substantially the same set of operative facts where "the facts that would give rise to breach of either of these agreements are not legally operative for establishing breach of the other"); *Kiewit Construction*, 56 Fed. Cl. at 420 (comparing factual elements underlying the legal theories being raised); *SMS Data Products Group, Inc. v. United States*, 19 Cl. Ct. 612, 616 (1990) (lost profits claim, which involves proof that the Government willfully obstructed performance, is a different claim than a compensatory damages claim, which involves proof of circumstances beyond the Government's control that renders the contract obsolete or impracticable); *National Housing Group, Inc. v. Department of Housing and Urban Development*, CBCA 340, et al., 09-1 BCA ¶ 34,043, at 168,377 (claim based upon latent ambiguities in contract was based upon same operative facts as negligent estimates, superior knowledge, and constructive change claim previously submitted to contracting officer); *Trepte Construction Co.*, ASBCA 38555, 90-1 BCA ¶ 22,595, at 113,386 ("As is evident from the elements of proof, the basic operative facts it must establish in order to demonstrate a constructive acceleration are substantially different than those by which entitlement to delay costs can be ascertained. We are not faced with only an alternative theory of recovery. The claims are different.").

Applying that standard to the theories of recovery being asserted here, we must compare the requirements for proving impossibility with those for proving a constructive change. A contractor seeking to prove impossibility (or commercial impracticability) must show that, "at the time a contract [was] made, [his] performance under it [was] impracticable without his fault because of a fact of which he [had] no reason to know and the non-existence of which [was] a basic assumption on which the contract [was] made," *Restatement (Second)*

of *Contracts* § 266(1) (1981), and he must further establish that he “explored and exhausted alternatives before concluding that the contract was legally impossible or commercially impracticable to perform.” *Massachusetts Bay Transportation Authority v. United States*, 254 F.3d 1367, 1373 (Fed. Cir. 2001) (quoting *Blount Brothers Corp. v. United States*, 872 F.2d 1003, 1007 (Fed. Cir. 1989)). To prove a constructive change, we look to see whether, during contract performance, the contracting officer “unilaterally . . . alter[ed] the contractor’s duties under the agreement; the contractor’s performance requirements [were] enlarged; and the additional work [was] not volunteered but result[ed] from a direction of the Government’s officer.” *Len Co. and Associates v. United States*, 385 F.2d 438, 443 (Ct. Cl. 1967).

Crane’s impossibility claim depends upon a defect in the original specification that made performance impossible, efforts by Crane to meet those defective specifications, and, ultimately, an alleged agreement (in March 2008) that the specifications were impossible (and through which BEP took corrective action). Conversely, both its constructive change and ambiguity claims depend upon an original specification that was workable, with an affirmative direction in September 2007 by the contracting officer to change the way that Crane was working, a direction that Crane asserts cost it additional monies. The alleged September 2007 direction to modify how Crane was working is unnecessary and essentially irrelevant to Crane’s impossibility claim, and its allegations in the claim that the original specification was defective is inherently inconsistent with the allegations in its constructive change and ambiguity claims. Although Crane mentions the September 2007 meeting in its claim supplement, Crane describes that meeting differently in its claim supplement than it does now. Particularly because the constructive change and ambiguity claims are highly dependent upon evidence relating to the September 2007 direction that is irrelevant to the impossibility claim, we cannot find that the constructive change and ambiguity claims are based upon the same operative facts as the impossibility claim that Crane submitted to the contracting officer. See *Ketchikan Indian Community v. Department of Health & Human Services*, CBCA 1053-ISDA, et al., 13-1 BCA ¶ 35,436, at 173,809 (“A new claim arises when the significant facts on which the new claim is based differ from the factual basis of the earlier claim.”).

When (as here) the contractor seeks the same relief under different legal theories, tribunals are more likely to find that the operative facts giving rise to new and different legal theories are sufficiently similar to the original claim to permit the tribunal to assert jurisdiction. *Regents of New Mexico State University v. United States*, No. 92-627C, 1994 WL 16867518, at *2 (Fed. Cl. May 31, 1994). Nevertheless, Crane’s assertion here that the damages it seeks under its impossibility claim (apparently running from March 2007 to March 2008) are substantially the same as those arising under its constructive change and ambiguity claims (which could not begin to run until September 2007) makes no sense. The

theories underlying these claims deal with different time periods and require different causation analyses, despite Crane's attempts to pigeon-hole them into the same box. Although the "same operative facts" standard does not require absolutely rigid "adherence to the exact language or structure of the original administrative CDA claim," *Scott Timber Co. v. United States*, 333 F.3d 1358, 1365 (Fed. Cir. 2003), it does not allow us to add into an existing "claim" new legal theories that depend upon factual allegations diametrically in conflict with those in the actual claim and that are dependent upon new and different factual elements and upon causation events that are irrelevant to the submitted claim. See *Ketchikan Indian Community*, 13-1 BCA at 173,809 ("Once the role of the contracting officer has been circumvented by predicating a claim on a new factual theory, the party has submitted a claim differing from the basic operative facts of the original claim.").

Because Crane's constructive change and ambiguity claims are separate and distinct from the impossibility claim that Crane submitted to the contracting officer, and because Crane never submitted the constructive change and ambiguity claims to the contracting officer for a decision, we would lack jurisdiction to entertain the constructive change and ambiguity claims. Accordingly, it would be futile to allow Crane to amend its complaint to add them to this appeal because they would be subject to dismissal.

C. Whether the New Claims Are Time-Barred

Even if Crane had submitted its constructive change and ambiguity claims to the contracting officer at the same time that it submitted its impossibility claim in March 2014, the constructive change and ambiguity claims would have been time-barred.

Section 7103 of the CDA provides that "[e]ach claim by a contractor against the Federal Government relating to a contract . . . shall be submitted within 6 years after the accrual of the claim." 41 U.S.C. § 7103(a)(4) (2012); see 48 CFR 33.206(a) ("Contractor claims shall be submitted, in writing, to the contracting officer for a decision within 6 years after accrual of a claim, unless the contracting parties agreed to a shorter time period."). Although the CDA does not define when a claim is considered to have accrued, the Federal Acquisition Regulation (FAR) provides a definition of the word "accrual" as it relates to a CDA claim. Under that definition, a contractor's claim will not accrue until all events fixing the alleged liability were known or should have been known to the contractor, with some resulting monetary or nonmonetary injury having occurred:

Accrual of a claim means the date when all events, that fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known. For liability to be fixed, some injury

must have occurred. However, monetary damages need not have been incurred.

48 CFR 33.201. In creating that definition, the drafters of the FAR provision expressly addressed the “injury” requirement, indicating that, “[i]n addition to the discovery of the events [giving rise to liability], a discovery of some damage has been added to cover the unusual case where the party is aware of the events giving rise to the claim, but not of any resulting damage.” 60 Fed. Reg. 48,224, 48,225 (Sept. 18, 1995).

“Generally, ‘[i]n the case of a breach of a contract, a cause of action accrues when the breach occurs.’” *Alder Terrace, Inc., v. United States*, 161 F.3d 1372, 1377 (Fed. Cir.1998) (quoting *Manufacturers Aircraft Association v. United States*, 77 Ct. Cl. 481, 523 (1933)); see *Franconia Associates v. United States*, 536 U.S. 129, 141 (2002) (statute of limitations starts to run on contract breach claim from the time of the breach); *Brighton Village Associates v. United States*, 52 F.3d 1056, 1060 (Fed. Cir. 1995) (“These claims accrued on the dates the alleged breaches occurred.”). Similarly, when the Government directs a change to the contract (either through a formal change order or as a constructive change), the contractor is ordinarily charged with knowledge of the enlarged scope of work as soon as it is notified of the enlargement:

For an ordinary changes claim, liability is fixed when the CO enlarges the work scope. Injury occurs as soon as the contractor starts doing the changed work and thus incurs additional costs. In such circumstances, the contractor ordinarily would be charged with knowledge as soon as the CO enlarges the scope of work. Therefore, the changes claim accrues when the contractor begins performing the changed work.

Martin P. Willard, *Limitations of Actions Under the Contract Disputes Act*, 13-9 Briefing Papers 1, 4 (Aug. 2013); see *Gray Personnel, Inc.*, ASBCA 54652, 06-2 BCA ¶ 33,378, at 165,476 (discussing accrual of constructive change claim). Regardless of the type of claim being raised, “[t]he issue of ‘whether the pertinent events have occurred is determined under an objective standard; a plaintiff does not have to possess actual knowledge of all the relevant facts in order for the cause of action to accrue.’” *FloorPro, Inc. v. United States*, 680 F.3d 1377, 1381 (Fed. Cir. 2012) (quoting *Fallini v. United States*, 56 F.3d 1378, 1380 (Fed. Cir. 1995)).

“[T]o determine when appellant’s claims accrued, and the events that fixed the alleged liability, we start by examining the legal basis for each particular claim.” *Environmental Safety Consultants, Inc.*, ASBCA 54615, 07-1 BCA ¶ 33,483, at 165,984. In *Gray*

Personnel, Inc., ASBCA 54652, 06-2 BCA ¶ 33,378, the Armed Services Board of Contract Appeals (ASBCA) explained the elements underlying a constructive change claim:

[T]he claim alleges a constructive change arising under the contract rather than a breach of contract. A constructive change occurs where, although the contracting officer has not issued a formal change order pursuant to the Changes clause, “the contracting officer has the contractual authority unilaterally to alter the contractor’s duties under the agreement; the contractor’s performance requirements are enlarged; and the additional work is not volunteered but results from a direction of the Government’s officer.” *Len Co. and Associates v. United States*, 385 F.2d 438, 443 (Ct. Cl. 1967). Under those circumstances, the contractor is entitled to an equitable adjustment pursuant to the Changes clause for any increase in its costs or time required to perform the contract.

In order for the contractor to assert a claim of this type, therefore, the government must have enlarged its performance requirements.

Id. at 165,476 (footnote omitted); see *Matrix Business Solutions, Inc. v. Department of Homeland Security*, CBCA 3438, 15-1 BCA ¶ 35,844, at 175,282 (2014) (to recover under a constructive change claim, the contractor must prove that the Government ordered it to perform additional work and that the work was not required under the contract).

Accordingly, to evaluate the accrual date of Crane’s constructive change claim, we review Crane’s amended complaint to identify the date upon which Crane alleges a contracting officer with authority expanded Crane’s performance obligations and directed Crane to meet those expanded requirements, over Crane’s objections. Crane asserts that, in September 2007, BEP “drastically changed its interpretation of the Contract laundry specifications, requiring Crane to achieve a Thread bonding result well beyond the standard” to which the parties had originally agreed, and that BEP directed Crane at that time to meet the new standard. Proposed Amended Complaint ¶ 18. Accordingly, September 2007 is the presumptive date on which Crane became aware that it would suffer an injury.

Nevertheless, to define the accrual date, we must still determine when Crane was allegedly injured by the contracting officer’s constructive change. “The second and third sentences of the definition [of ‘accrual of a claim’] in FAR 33.201 state that in order for liability to be fixed ‘some injury must have occurred,’ but ‘monetary damages need not have been incurred.’” *Gray Personnel*, 06-2 BCA at 165,476 (quoting FAR 33.201). “[I]n some circumstances . . . the [contractor] may not be damaged until [some time] much later” than the actual contract breach or change, and, “[i]n such a case, the claim for breach of contract,”

or the running of the deadline for submitting a claim, “will not accrue for statute of limitations purposes until the damages are incurred.” *SAB Construction, Inc. v. United States*, 66 Fed. Cl. 77, 88 (2005), *aff’d*, 206 F. App’x 992 (Fed. Cir. 2006); *see Terteling v. United States*, 334 F.2d 250, 254 (Ct. Cl. 1964) (“It is too well established to require citation of authority that a claim does not accrue until the claimant has suffered damages.”). Claim accrual depends upon “when [the contractor] should have known that it had been damaged by the government’s breach” or change. *Ariadne Financial Services Pty. Ltd v. United States*, 133 F.3d 874, 878 (Fed. Cir. 1998).

“[I]n the usual case the contractor suffers damages upon the occurrence of the breach” or change. Martin P. Willard, *supra*, at 4; *see SAB Construction*, 66 Fed. Cl. at 88 (“It is perhaps more common that the plaintiff is damaged at the time of breach.”). “[F]or a claim to accrue, the contractor ‘must [only] have actually begun performance and incurred *some* extra costs for liability to be fixed,’ and the completion of a change or of the contract [is] not necessary in order for liability to be fixed.” *Robinson Quality Constructors*, ASBCA 55784, 09-1 BCA ¶ 34,048, at 168,396 (quoting *Gray Personnel*, 06-2 BCA at 165,476) (emphasis added); *see ASFA International Construction Industry & Trade, Inc.*, ASBCA 57880, 14-1 BCA ¶ 35,736, at 174,910 (“It is not necessary for the total costs of the liability to be incurred; rather once a party is on notice that it has a potential claim, the statute of limitations can start to run.”); FAR 33.201 (“some injury must have occurred”). A contractor cannot delay the running of the statute of limitations “until the *extent* of its damage from the breach [is] reasonably certain.” *Ariadne Financial*, 133 F.3d at 879 (emphasis added).

It is clear from the allegations in the proposed amended complaint that Crane was performing work on the contract prior to the alleged September 2007 constructive change and continued working on it, in accordance with the contracting officer’s alleged stricter laundry test direction, immediately thereafter. We do not have a situation in which the contractor was able to delay implementation of the contracting officer’s direction for a long period of time or did not immediately (or soon thereafter) feel the cost effects of the constructive change. Accordingly, there is nothing in Crane’s proposed amended complaint to suggest that claim accrual was delayed for some period of time after the constructive change. Crane’s constructive change claim accrued in September 2007.³ Crane’s alternate new legal

³ The ASBCA has suggested that, because the CDA requires use of “the ‘should have been known’ test of claim accrual which ‘has a reasonableness component [based] upon what facts were reasonably knowable to the claimant,’” boards should not normally dismiss a claim as untimely even at the summary judgment stage “where reasonableness and subjective knowledge are facts at issue.” *Kellogg Brown & Root Services, Inc.*, ASBCA 58518, et al., 16-1 BCA ¶ 36,408, at 177,527-28 (quoting *Raytheon Co.*, ASBCA 58849,

theory – that, in September 2007, the contracting officer clarified ambiguous contract specifications regarding the laundry testing requirements in a manner that increased Crane’s costs – similarly accrued in September 2007.

We recognize that, in *Kellogg Brown & Root Services, Inc. v. Murphy*, 823 F.3d 622 (Fed. Cir. 2016), the Court of Appeals for the Federal Circuit recently held that “a ‘claim’ for ‘the payment of money’ does not ‘accrue’ until the amount of the claim, ‘a sum certain,’ FAR § 2.101, is ‘known or should have been known,’ *id.* § 33.201.” *Id.* at 627; *see id.* at 628 (“Accrual in accordance with FAR § 33.201 does not occur until [the contractor] requests, or reasonably could have requested, a sum certain from the government.”). This cannot mean, however, that accrual of a claim under the CDA is uniformly deferred until a contractor has incurred *all* costs that it is going to incur from a contract breach or change. In the past, the Federal Circuit has clearly approved the contractor’s submission of claims *before* the contractor has incurred all costs resulting from a change or breach. *See, e.g., Caldera v. J.S. Alberici Construction Co.*, 153 F.3d 1381, 1383 (Fed. Cir. 1998) (considering claim that was submitted in a sum certain before all costs resulting from differing site condition had been incurred); *Servidone Construction Corp. v. United States*, 931 F.2d 860, 862 (Fed. Cir. 1991) (“At the time it filed a proper claim [including identification of amount of claim in a sum certain], Servidone had yet to incur the total costs which it later recovered.”). In response to a contract change, a contractor is entitled to submit a claim in a “sum certain” that utilizes forward pricing for future anticipated costs, *Computer Sciences Corp.*, ASBCA 27275, 83-1 BCA ¶ 16,452, at 81,843; that reserves its right to claim additional amounts in the future for costs to be later incurred as a result of a change, *Ball Aerospace & Technologies Corp.*, ASBCA 57558, 11-2 BCA ¶ 34,804, at 171,276; or that reserves its right to revisit the claimed “sum certain” amount until the time that a final release is executed. *Zafer Taahhut Insaat ve Ticaret A.S.*, ASBCA 56770, 12-1 BCA ¶ 34,951, at 171,831.

The FAR provision defining “accrual,” upon which the Federal Circuit in *Kellogg Brown* relied, expressly indicates that only “some injury,” rather than the totality of injury, need occur before the limitations period on a claim starts to run. 48 CFR 33.201. A claim must accrue, and the statute of limitations starts to run, as soon as a contractor *can* assert a claim, even if it has not yet incurred all possible costs resulting from the change or breach.

15-1 BCA ¶ 36,000, at 175,866). Here, we do not have to resolve disputes about the material facts. Crane’s own allegations, as set forth in its proposed amended complaint, make clear when Crane was or should have been aware of its constructive change claim. In such circumstances, there is no reason to defer ruling on a claim accrual date when the appellant’s own allegations establish that date.

Axion Corp. v. United States, 68 Fed. Cl. 468, 480 (2005); see *Holmes v. United States*, 657 F.3d 1303, 1317 (Fed. Cir. 2011) (“A cause of action first accrues when all the events have occurred that fix the alleged liability of the government and entitle the claimant to institute an action.”); *Bohus v. Beloff*, 950 F.2d 919, 924 (3d Cir. 1991) (statute of limitations starts to run “as soon as” the party knows or should know that it has been injured by another’s conduct); *College Hill Properties, LLC v. City of Worcester*, 135 F. Supp. 3d 10, 16 (D. Mass. 2015) (claim accrues “as soon as” plaintiff knows or should know of claim). Any interpretation of *Kellogg Brown* as holding that a claim does not accrue until the contractor can identify and has incurred *all* costs resulting from a change or breach would directly conflict with the implementing FAR provision, as well as the Federal Circuit’s past guidance as to when claims accrue. See *Ariadne Financial*, 133 F.3d at 879 (contractor cannot delay running of limitations period “until the extent of its damage from the breach [is] reasonably certain”).

In fact, the Court in *Kellogg Brown* did not find that all costs must be incurred before a claim can accrue. The contractor in that case, the Court stated, could not have suffered any injury from the Government’s breach until it received a claim from its subcontractor, which was the earliest time that, under the Federal Circuit’s analysis, the claim might have accrued for statute of limitations purposes. The claim at issue there related to costs that the prime contractor was going to have to pay its subcontractor, costs that became dependent upon resolution of a district court action through settlement. In that settlement, the prime and the subcontractor agreed that the subcontractor would provide the prime with a claim to submit to the Government, but there was no dispute that, before receipt of that claim, the prime had no information about the costs that the subcontractor might seek. *Kellogg Brown*, 823 F.3d at 627. The Court in *Kellogg Brown* also discussed how the Government, in response to an early attempt by the prime contractor to submit a claim for the costs that it anticipated it might have to pay the subcontractor, had refused to consider the submitted information and directed the prime contractor to settle with the subcontractor before submitting the bill to the Government. *Kellogg Brown*, 823 F.3d at 624-25; see *id.* at 628 (“Here, the Army required that [the contractor] resolve disputed costs with the subcontractor before [the contractor] could present a claim for reimbursement of those costs.”). The Court found that, at least until the subcontractor had submitted its own claim to the prime, the prime contractor “did not have sufficient information to request a sum certain” from the Government, and the claim could not have accrued. *Id.* at 627.

We have a very different situation here. First, Crane is claiming its *own* costs of performance, costs that it incurred itself, rather than subcontractor costs about which Crane could not have known until the subcontractor presented them to Crane; accordingly, Crane suffered its own injury (through the incurrence of costs) as soon as it received the contracting officer’s direction in September 2007. Second, there is no suggestion here that the BEP told

Crane to defer submitting its claim until a later date after other events had occurred. Accordingly, the analysis in *Kellogg Brown* does not affect or delay the claim accrual date here.

Crane did not submit a certified claim to the contracting officer until March 2014, more than six years after its newly asserted constructive change and ambiguity claims had accrued in or soon after September 2007. As a result, its constructive change and ambiguity claims are barred by the CDA statute of limitations. Because Crane's new claims would be subject to dismissal for failure to state a claim, *see Systems Management & Research Technologies Corp. v. Department of Energy*, CBCA 4068, 15-1 BCA ¶ 35,976, at 175,788-89 (if allegations in complaint show that claim is barred by CDA statute of limitations, the complaint is subject to dismissal for failure to state a claim), it would be futile to grant Crane leave to file an amended complaint adding that theory of liability to this appeal.

Decision

Because it would be futile to allow Crane to amend its complaint to add the constructive change and ambiguity claims, Crane's motion for leave to amend is **DENIED**.

HAROLD D. LESTER, JR.
Board Judge

We concur:

JERI KAYLENE SOMERS
Board Judge

RICHARD C. WALTERS
Board Judge